

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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PAYROLL FUNDING COMPANY LLC, a
Nevada limited liability company,

Case No. 2:11-cv-00943-APG-NJK

Plaintiff,

**ORDER AMENDING ORDER GRANTING
PARTIAL SUMMARY JUDGMENT,
NUNC PRO TUNC**

V.

ATLANTIC CONSTRUCTION GROUP (ACG) LLC, a Michigan limited liability company; ASSURED SOURCE, INC., a Delaware corporation; ASSURED SOURCE ASO, LLC, a Delaware limited liability company; PBC GROUP LLC, a New York limited liability company; PHOENIX BUILDING CORP., a New York corporation; JAMES A. D'IORIO, an Individual; THOMAS D'IORIO, an Individual; THOMAS ATAMANOFF, an Individual; and DOES I through X and ROE CORPORATIONS I through X, inclusive.

Defendants.

On February 28, 2012, the Court entered an Order (Dkt. no. 13) granting Plaintiff's Motion for Partial Summary Judgment pursuant to Local Rule 7-2(d), finding Defendants' failure to oppose the motion constituted consent to its granting. Under recent Ninth Circuit authority, a district court may not grant summary judgment based solely on a "deemed admitted"¹ local rule.

¹ Under the local rule at issue in *Heinemann* and here, the district court may “deem a non-movant’s failure to respond a complete abandonment of its opposition to summary judgment;” in other words, the failure to file an opposition constitutes “consent to the granting of the motion.” District of Nevada Local Rule 7-2(d).

1 See *Heinemann v. Satterberg*, No. 12-35404, 2013 WL 5312568 *3 (9th Cir., Sept. 24, 2013). In
 2 *Heinemann*, the Ninth Circuit held that “a motion for summary judgment may not be granted
 3 based on a failure to file an opposition to the motion, regardless of any local rule that suggests the
 4 contrary.” *Id.* at *2.

5 Although legally sound at the time of the granting of the motion, the efficacy of the
 6 district court’s order has now been called into question by the Ninth Circuit’s opinion in
 7 *Heinemann*. Simply, it has now been clarified that Federal Rule of Civil Procedure 56 “prohibits
 8 the grant of summary judgment ‘by default even if there is a complete failure to respond to the
 9 motion.’” *Id.* at *3 (quoting Fed. R. Civ. P. Advisory Notes (2010)). In the interest of judicial
 10 economy and preventing remand on appeal, the Court is forced to re-examine the merits of the
 11 Motion for Partial Summary Judgment. Therefore, the prior Order is amended to include the
 12 following:

13 **I. DISCUSSION**

14 The Federal Rules of Civil Procedure provide for summary adjudication when the
 15 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
 16 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant is
 17 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that may
 18 affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
 19 Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the
 20 consideration of a motion for summary judgment. *Id.* A dispute as to a material fact is genuine if
 21 there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*
 22 “Summary judgment is inappropriate if reasonable jurors, drawing all inferences in favor of the
 23 nonmoving party, could return a verdict in the nonmoving party’s favor.” *Diaz v. Eagle Produce*
 24 *Ltd. P’ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (citing *United States v. Shumway*, 199 F.3d
 25 1093, 1103–04 (9th Cir. 1999)).

26 In determining a summary judgment motion, the Court may consider only admissible
 27 evidence. Fed. R. Civ. P. 56(e); *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th
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1 Cir. 1988). To be admissible, proper foundation must be laid and documents must be
2 authenticated. *Id.*; *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987). In a
3 summary judgment motion, documents authenticated through personal knowledge must be
4 “attached to an affidavit that meets the requirements of [Fed. R. Civ. P.] 56(e) and the affiant
5 must be a person through whom the exhibits could be admitted into evidence.” *Canada*, 831 F.2d
6 at 925.

7 Plaintiff seeks summary judgment on the first claim for breach of contract against all
8 Defendants. In support of the motion, Plaintiff offers the allegedly breached contracts, a purchase
9 agreement between ARRT Receivables, Inc. (“ARRT”) and Payroll Funding Company, LLC
10 (“Payroll”) selling ARRT’s right of payment under the alleged breached contracts to Payroll, and
11 the declarations of Demlar Janovec (President of ARRT) and William R. Robins (managing
12 member of Payroll).

13 Having reviewed the proffered exhibits, the Court finds there is no genuine issue of
14 material fact precluding summary judgment. Defendants were parties and sureties of several
15 different loan agreements (“Agreements”) with both ARRT and Payroll. ARRT and Payroll
16 entered into a contract whereby ARRT sold its rights to payment and to pursue loan repayment
17 under the Agreements to Payroll. Defendants failed to completely repay the loans pursuant to the
18 Agreements.

19 The Agreements and the affidavits combined establish the amount of each Defendant’s
20 liability and the attorney’s fees due to Plaintiff in pursuing the collection of the monies owed
21 under the Agreements. Under the Agreements, after applying payments made, Payroll Funding
22 Company LLC is entitled to judgment against Phoenix Building Corp. in the amount of
23 \$214,742.93; against Atlantic Construction Group (ACG) LLC in the amount of \$22,087.25;
24 against PBC Group LLC in the amount of \$35,890.05; against Thomas D’Iorio in the amount of
25 \$250,632.98; against James D’Iorio in the amount of \$214,742.93; against Thomas Atamanoff in
26 the amount of \$186,342.37; and against Assured Source PEO, LLC in the amount of \$250,632.98.
27 Moreover, pursuant to the breached Agreements, Defendants Phoenix Building Corp., Atlantic
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1 Construction Group (ACG) LLC, PBC Group LLC, Thomas D'Iorio, James D'Iorio, Thomas
2 Atamanoff, and Assured Source PEO, LLC are jointly and severally liable to pay Plaintiffs'
3 attorney's fees in the amount of \$17,973.88 incurred through December 31, 2011.

4 **II. CONCLUSION**

5 IT IS HEREBY ORDERED that the Court's prior Order is amended to include the
6 analysis herein. The Judgment remains unaffected.

7 DATED THIS 18th day of November 2013.
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10 ANDREW P. GORDON
11 UNITED STATES DISTRICT JUDGE

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